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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CESAR D. JARABE, SR., individually and for the benefit of the Estate of TOMASA ISMA JARABE, his deceased wife,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and AMERICAN AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can the amount of death benefits payable under Illinois Law be set according to whether the foreign country is a favored or unfavored venue for the receipt of the benefits?

2. Does a U.S. citizen, upon the citizen's work related death, have a right under the 14th Amendment to require the state's workers' compensation law provide death benefits for her alien dependents equal to those of other workers similarly situated and protected under the state's workers' compensation law?

3. If so, may the deceased worker's right be defeated by a state decision which holds that the dependent beneficiary cannot assert the deceased worker's right to equal protection?

PARTIES TO THE PROCEEDINGS

The caption of the case in the Court contains the names of all parties to the proceedings in the Supreme Court of Illinois.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Cesar D. Jarabe, Sr., prays that a Writ of Certiorari be granted to review the judgment of the Illinois Supreme Court reached in *Cesar D. Jarabe, Sr. v. The Industrial Commission and American Airlines, Inc.*, on March 28, 1996.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois in *Cesar D. Jarabe, Sr. v. The Industrial Commission and American Airlines, Inc.* is printed at Appendix A at p. A-1,

infra, and is reported as 172 Ill.2d 345 (1996). The Circuit Court of Cook County, Illinois entered an unpublished declaratory judgment and order June 5, 1995. This decision is printed at Appendix B at page B-1.

On October 16, 1995 the Illinois Industrial Commission issued a summary affirmance and adopted the opinion of the Arbitrator. The Commission Decision and Opinion on Review is reported by Tower Records of Illinois under Docket cite 95 IIC 0209 and printed in Appendix C at page C-1.

JURISDICTION

The opinion of the Illinois Supreme Court was issued March 28, 1996. Jarabe filed a timely request for rehearing. It was denied June 3, 1996. The decision is in Appendix A at page A-1 and the denial of the Request for Rehearing is in Appendix A at page A-8. This Petition was filed within 90 days of the denial of the petition for rehearing. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, Section 10, Clause 1, Article II, Section 2, Clause 2, and Article VI, Clause 2 of the United States Constitution, Section 1 of the 14th Amendment to the United States Constitution and 820 ILCS 305/7. They are reprinted in Appendix D at pages D-1 and D-2.

STATEMENT OF THE CASE

On April 4, 1993 Abundia Jarabe McLeod was killed. She was working as a baggage handler for American Airlines when she was struck in the head by a propeller. She was a United States' citizen residing in Chicago, Illinois. She supported her mother and father, Cesar D. Jarabe and Tomasa Isma Jąrabe. They were dependent upon her support. Cesar and Tomasa were citizens and residents of the Philippines. Abundia Jarabe McLeod was covered by the Illinois Worker's Compensation Act because her work had been declared extra hazardous by the legislature, 820 ILCS 205/3.

After taking evidence, Arbitrator Hagan decided she did not have jurisdiction to rule on the constitutionality of 820 ILCS 305/7 (i). She awarded Petitioners death benefits pursuant to 820 ILCS 305/7 (b). Section 7(b) provides that where a deceased worker does not leave a surviving spouse or children, but does leave a surviving parent(s) who it is shown are totally dependent upon the earnings of the deceased worker, then the parents are entitled to benefits of two-thirds the average weekly wage of that deceased worker. The class benefit in Section 7 (b) of the Act is limited by 820 ILCS 305/7 (i) which says that when the dependents are aliens who do not reside in the United States, Mexico or Canada, the death benefit provided by section 7 (b) is reduced by 50%. Arbitrator Hagan then reduced benefits to $148.75 per week (Vol. I, C.0008-C.0012, C.0027-C.0030). Petitioner filed a review with the Industrial Commission. It adopted the findings and decision of the arbitrator as its opinion and decision in this matter and declined to address constitutional issues (Vol. I, C.0006-C.0007).

The Petitioner then filed a review of the commission decision and a count for declaratory judgment in the Circuit Court of Cook County, Illinois challenging the constitutionality of 820 ILCS 305/7 (i) (Vol. I, C.0003-C.0005). The circuit judge did not rule on the arguments based on principles of federalism (Vol. II. C.0083-C.0084A). Judge Berman entered judgment and declared 820 ILCS 305/7 (i) unconstitutional because it violated the deceased worker's 14th Amendment rights to equal protection and due process in the United States Constitution (Vol. I., C.0083-C.0084). Judge Berman relied upon *De Ayala v. Florida Farm Bureau Cas. Ins.* (Fla. 1989) 543 So. 2d 204 and *Jurado v. Popejoy Const. Co.*, (Kan. 1993) 853 P.2d 669 as persuasive that the claimant's could assert the constitutional rights of the deceased worker (Vol. II, C.0011-C.0017). He held that in constitutional terms the right to benefits grows out of the same plant, the worker working at the job (Vol. II, C.0016-C.0017).

The Supreme Court of Illinois reversed the circuit court judge's decision. The court held the statute constitutional as to the equal protection challenge because the Workers' Compensation Act grants the Jarabes their own independent right to death benefits. Therefore, the court concluded, the Jarabes had no standing to assert their deceased daughter's rights. As aliens residing outside the United States they could not complain about the unequal protection. With respect to the preemption arguments, Justice Heiple, writing for the Illinois Supreme Court, said that Section 7 (i) is a state created welfare benefit ergo petitioner's claim that the federal government's powers in foreign affairs preempts any power in a state legislature to formulate policy based on a country by country classification, favoring some countries over others, as the

sole factor in granting or modifying state welfare benefits was "patently meritless."

REASONS FOR GRANTING THE WRIT

1.

Preemption of State Law

Illinois favors Canada and Mexico for special treatment, 820 ILCS 305/7 (i), *Jarabe v. Industrial Comm'n*, 172 Ill.2d 345. Utah favors only Canada but not Mexico, U.C.A. 1953, Section 35-1-72, *Alverez Martenez v. Industrial Comm'n*, 720 P.2d 416 (Utah 1986). Each State is a power onto itself with respect to welfare benefits paid to foreign beneficiaries, *Jarabe v. Industrial Comm'n*, 172 Ill.2d 345. Each State decides for itself how it will treat foreign nationals based on their residency in a favored or unfavored foreign country. Indiana can say no benefits to Cubans. Washington State can declare Nato countries eligible all others denied. The variety of answers is of course as variable as the fifty States choose.

The rationale employed by the Illinois Supreme Court to justify the unequal compensation payments to aliens based on a country by country classification of favored or unfavored nations under Illinois law is that workers' compensation is a state welfare program, *Jarabe v. Industrial Comm'n*, 172 Ill.2d 345. Even though this statement is true, States are prohibited by the Constitution from establishing foreign policies, even in the absence of a treaty, which can disturb foreign relations, *Zschernig v. Miller*, 389 U.S. 429 at 440, 19 L. Ed. 2d 683, 692, 88 S. Ct. 664. Its rationale ignores an observation of this Court stated in *Hines v. Davidowitz*, 312 U.S. 52 at 64, 85 L. Ed. 851, 858, 61 S. Ct. 399: "[I]nterna-

tional controversies of the gravest moment . . . may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government." *Hines v. Davidowitz*, 312 U.S. 52 at 64, 85 L. Ed. 581, 61 S. Ct. 399. Justices Stewart and Brennan observed in their concurring opinion in *Zschernig, supra*, 398 U.S. 442, 19 L. Ed. 2d 693, that the issue of the allocation of powers between the States and National Government is a fundamental constitutional issue whose resolution cannot vary from day to day based on the popular view or prevailing local policy. Section 7 (i)'s limitations upon alien recipients is politically popular today, but the conduct of our foreign relations and affairs is entrusted under the Constitution to the National Government, not to Illinois or any one of the several States.

The Supreme Court of the United States maintains the design for federalism contemplated by the Framers, Article VI, Clause 2, U.S. Constitution. It is its unique duty to preserve the federal nature of the Republic, *Marbury v. Madison,* 1 Cranch 137, 177, 2 L. Ed. 60 (1803) (Marshall, C. J.). The principles of federalism as created by the Constitution are important for practical as well as theoretical reasons, *United States v. Lopez*, 514 U.S. __, 131 L. Ed. 2d 626, 633, 115 S. Ct. ___ (1995). Federal law (even when exercised for a good purpose) which exceeded Congress's enumerated powers is unconstitutional, *United States v. Lopez*, 514 U.S. __, 131 L. Ed. 2d 626, 633, 115 S. Ct. ___ (1995). We believe that States cannot exercise exclusively Federal powers.

Our first argument rests on the premise that 820 ILCS 305/7 (i) exercises powers reserved to the Federal Government. As stated in *Goldstein v. California*, 412 U.S. 546, at 552, 37 L. Ed. 2d 163, 93 S. Ct. 2303, "a State

cannot exercise a sovereign power which, under the Constitution, they have relinquished to the Federal Government for its exclusive exercise." If our assertion is correct Petitioner is entitled to a writ of certiorari.

The Workers' Compensation Act "is social welfare legislations which exists to provide employees and their dependents certain compensation for injuries or death suffered in the course of employment," *Jarabe v. Industrial Comm'n.* 172 Ill.2d 345 (1996), 820 ILCS 305/7 (i) names the nations of Canada and Mexico for most favored nation treatment. We ask for the basis of the distinction in Section 7 (i). Why favor an alien dependent residing in Mexico over an alien dependent residing in the Philippines? What other reason exists other than foreign policy? Isn't 820 ILCS 305/7 (i) a foreign policy classification by a state government? It gives a preference to Mexican and Canadian residents. They alone are given the full benefits otherwise only accorded to residents of the United States of America and denied all others, *Andja Kolvart v. Oregon* 366 U.S. 187, at 193-194, 6 L. Ed. 2d 218, 81 S. Ct. 922. Justice Heiple was under a duty to seriously consider these questions. Justice Heiple dismissed the issues as "bald assertions" and "patently meritless" stating "neither the Act nor the particular provision at issue run afoul of principles of federalism" without giving any judicial analysis of the question placed before him as required by Article VI, Clause 2, United States Constitution.[1]

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[1] The Supreme Court of Illinois having been asked quo warranto, by what authority does the legislature create the classification and exercise the distinctions made with respect to foreign powers necessarily should have explained the source of

(continued...)

Simply put, only the United States of America can make distinctions, if any are to be made, about how foreign nationals are treated under American law based solely on their country of residency. *Zschernig v. Miller*, 389 U.S. 429, 440, 19 L. Ed. 2d 683, 692, 88 S. Ct. 664. The authority for this claim of exclusivity arises from two provisions of the Constitution. The first constitutional provision grants authority to the National Government to make the treaties and conduct foreign policy, Article II, Section 2, Clause 2, *Perez v. Brownell*, 356 U.S. 44, at 57, 2 L. Ed. 2d 603, 78 S. Ct. 568, *United States v. Curtis-Wright Export Corp.* 299 U.S. 304 at 318, 81 L. Ed. 255, 57 S. Ct. 216. The second provision prohibits the States from exercising any powers in the foreign policy field, Article I, Section 10, Clause 1.

In *Goldstein v. California*, 412 U.S. 546 at 552-553, 37 L. Ed. 2d 163, 93 S. Ct. 2303, this Court in construing state powers used the principles stated by Alexander Hamilton in Number 32 of the Federalist. Hamilton wrote:

> State government would clearly retain all the right of sovereignty which they before had, and which were not by that act, **exclusively** delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union and in another prohibited the States exercising like authority; and where it granted an authority to the Union, to which

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[1] (...continued)
the State's authority and given guidance. Instead it summarily dismissed the issue as "patently meritless", *Jarabe v. Industrial Comm'n.*, 172 Ill.2d 345, (1996).

> a similar authority in the States would be absolutely and totally contradictory and repugnant.[2]

Mr. Hamilton, in Federalist Number 32, goes on to point out:

> We there find that notwithstanding the affirmative grants of general authority, there has been the *most pointed care* in those cases where it was deemed improper that **like authorities** should reside in the States, to insert negative clauses prohibiting the exercise of them by the States. The tenth section of the first article consist altogether of such provisions. This circumstance is a clear indication of the sense of the Convention, and furnishes a rule of interpretation out of the body of the act which justifies the position I have advanced, and refute every hypothesis to the contrary.[3]

This clear intent to foreclose the States from any powers whatsoever with respect to state legislative classifications based upon a country by country classification under Article I, Section 10, Clause 1 is stated by James Madison in Federalist No. 44:

> a fifth class of provision in favor of federal authority, consists of the following restrictions on the authority of the several States: 1. "No State shall enter into any treaty, alliance or confederation, grant letters of marque . . . The prohibition against treaties, alliances and confederations . . . need no explanation . . . The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new . . .

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[2] The Federalist No. 32, p 152 (Bantam Classics 1982).

[3] The Federalist No. 32, p 154-155, (Bantam Classics ed 1982). See also The Federalist No. 3 (Jay) (Bantam Classic ed 1982) p 11-12.

> these licenses must be obtained as well . . . from the government of the United States. This alteration is fully justified by the advantage of **uniformity in all points which relate to foreign powers**; and immediate responsibility to the nation in all those, for whose conduct the nation itself is to be responsible.", The Federalist, No. 44 (Madison) (Bantam Classic ed 1982) at 225-226.

The National Government has the sole authority to conduct foreign policy, enact classifications of foreign countries and attach to these classifications rights, benefits or treatment to be accorded such foreign countries or their residents under law, *Perez v. Brownell,* 356 U.S. 44, at 57, 2 L. Ed. 2d 603, 78 S. Ct. 568, *United States v. Curtis Wright Export Corp.* 299 U.S. 304. at 318, 81 L. Ed. 255, 57 S. Ct. 216. The Constitution does not leave Illinois the Power to create a classification based on foreign residency and nationality.

We pray the Supreme Court of the United States to construe the United States Constitution as prohibiting this state law classification. We ask for the United States Supreme Court's judgment on this issue. Can the amount of death benefits payable under Illinois law be set according to whether the foreign country is a favored or unfavored venue for the receipt of the benefits?

2.

Decision below Conflicts with other Decisions of State Supreme Courts on Equal Protection

Our second reason for the granting of this writ rests upon the fact that there is a disagreement among the Supreme Courts of Kansas and Florida and the Supreme Courts of Illinois, Georgia and Utah as to the ability of

an alien dependent to assert the rights of a deceased worker and challenge unequal treatment which is accorded to the worker's dependent under state law.

The State of Illinois enacted social welfare legislation to provide employees and their dependents certain compensation for injuries or death, suffered in the course of employment, *Jarabe v. Industrial Comm'n*, (1996) 172 Ill.2d 345. Abundia Jarabe McLeod, a citizen of the United States, had a cognizable federal interest to equal protection and due process. She was a noncontractual covered employee under the Illinois Workers' Compensation Act. As such, she had a right to be provided for equally with other employees as regards the benefits which flow from her employment by virtue of Illinois law, *Califano v. Goldfarb,* 430 U.S. 199, at 211-212, 51 L. Ed. 2d 270, 97 S. Ct. 1021, *Weinberger v. Wiesenfeld,* 420 U.S. 636, at 645-47, 43 L. Ed. 2d 514, 95 S. Ct. 1225. This Court has recognized the applicability of the 5th Amendment in regards to Federal welfare legislation:

> Where the interest is 'noncontractual' does not mean that a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment nor does it sanction differential protection for covered employees which is solely gendered base protection, *Califano*, 430 US 211-212.

Applying the 14th Amended to Illinois, it has a similar duty to provide Abundia Jarabe McLeod equal treatment with other employees as regards to benefits which flow from her employment in the event of her death. The day she died Illinois had violated this right. On her death her dependents could properly assert this violation because the violation was continuing, even if the benefits are de-

clared by state law as personal rather than derivative benefits. Illinois violated Abundia Jarabe McLeod's interest in equal protection. It gave her differential protection based solely on an irrational distinction between alien dependents residing in Mexico or Canada versus her situation with alien dependents residing in another country, *Reed v. Reed,* 404 U.S. 71, 76-77, 30 L. Ed. 2d 225, 92 S. Ct. 251.

Sub judice, Illinois gave her less protection than not only other citizen workers similarly situated but less protection than accorded to an (illegal) alien who is killed in an Illinois industrial accident leaving dependents in Mexico or Canada.

We claim that under the state workers' compensation acts of the various States, the death benefits granted by law are all derivative benefits for constitutional purposes. We base this claim on the fact that the sole reason for the existence of the benefit flows from the fruits of the killed worker's labor in the course of the employment and the worker's relationship to the dependent.

The 14th Amendment should be applied uniformly throughout the United States. Today there is a conflict between the holdings in the cases of *De Ayala v. Florida Farm Bureau Casualty Insurance Co.,* 543 So. 2d 204 (Fla. 1989) and *Jurado v. Popejoy Construction Co.,* 253 Kan. 116, 853 p. 2d 669 (1993) with the opinions in the cases of *Barge-Wagener Construction Co. v. Morales,* 263 Ga. 190, 429 S.E. 2d 671 (1993); *Martinez v. Industrial Comm'n,* 702 p. 2d 416 (Utah 1986); *Pedrazza v. Sid Fleming Contractor, Inc.,* 94 N.M. 59, 607 p. 2d 597 (1980) with respect to the applicability of this Amendment to state workers' compensation laws. We pray the Supreme Court of the United States resolve this conflict

by ruling on the issue of whether alien dependent beneficiaries of deceased workers can assert the 14th Amendment rights of the deceased workers when seeking compensation under a State's workers' compensation act.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Dated March 28, 1996]

Docket No. 79666-Agenda 13-January 1996.
CESAR JARABE, SR., Indiv. and for the Benefit of the Estate of Tomasa Isma Jarabe, Deceased, Appellee, v. THE INDUSTRIAL COMMISSION (American Airlines, Inc., Appellant).

JUSTICE HEIPLE delivered the opinion of the court:

After a hearing, the circuit court of Cook County declared unconstitutional, as a violation of due process and equal protection, section 7(i) of the Workers' Compensation Act (820 ILCS 305/7(i) (West 1992)). Section 7(i) limits the amount of death benefits payable to the dependents of a deceased employee if those dependents are aliens who do not reside in the United states, Mexico, or Canada. For the reasons that follow, we reverse the judgment of the trial court.

BACKGROUND

Plaintiffs, Cesar Jarabe, Sr., and Tomasa Isma Jarabe, nonresident aliens residing in the Philippines, claimed workers' compensation benefits following the death of their daughter, Abundia Jarabe McLeod, who was killed while working as a baggage handler for the defendant, American Airlines. After an arbitration hearing, plaintiffs[1] were awarded $297.51 per week in death benefits

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[1] Tomasa Isma Jarabe died during the pendency of these proceedings. For ease of reference, we shall refer to Cesar Jarabe, Sr., and the estate of Tomasa Jarabe collectively as plaintiffs.

under section 7(b) of the Workers' Compensation Act, which provides that where a deceased worker does not leave a surviving widow or child but does leave a surviving parent or parents who were totally dependent on the earnings of the deceased worker, the parent or parents are entitled to weekly benefits of two-thirds the average weekly wage of the deceased worker. 820 ILCS 305/7(b) (West 1992). However the Arbitrator found that plaintiffs' statutory benefits were limited by section 7(i) of the Act, which provides in pertinent part:

> "(i) Whenever the dependents of a deceased employee are aliens not residing in the United States, Mexico or Canada, the amount of compensation payable is limited to the beneficiaries described in paragraphs (a), (b) and (c) of this Section and is 50% of the compensation provided in paragraphs (a), (b) and (c) of this Section, except as otherwise provided by treaty."
>
> 820 ILCS 305/7(i) (West 1992).

Plaintiffs were thus awarded $148.75 each week for life, representing 50% of the $297.51 per week which plaintiffs would have been entitled to in the absence of section 7(i). Plaintiffs appealed the award of benefits to the Industrial Commission, which affirmed the decision of the arbitrator. Thereafter, plaintiffs appealed the Commission's decision to the circuit court. The circuit court ruled that section 7(i) of the Act is unconstitutional, as it violates the due process and equal protection clauses of the Illinois and United States Constitutions.

Defendant appealed the circuit court's ruling to the appellate court. Upon plaintiffs' motion, the appeal was transferred to this court. 134 Ill. 2d R. 365 (b).

I

Plaintiffs' primary contention on appeal is that section 7(i) of the Act violates the equal protection and due process clauses of the Illinois and United States Constitutions. Defendant responds that the plaintiffs do not have standing to challenge the statute on these grounds because nonresident aliens cannot avail themselves of these state or federal constitutional protections.

The fourteenth amendment to the federal Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.Const., amend. XIV.

The Illinois Constitution provides that "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Ill.Const. 1970, art. I, S2.

This court uses the same analysis in assessing equal protection claims under both the federal and the State Constitutions. *People v. Reed,* 148 Ill. 2d 1, 7 (1992). The standards governing the due process and equal protection inquiry are identical. *Reed*, 148 Ill. 2d at 11.

In the seminal case of *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886), the United States Supreme Court held that the protection of the fourteenth amendment is territorial and applies only to those persons within the territorial jurisdiction of the

United States. Contrary to plaintiffs' suggestions, *Yick Wo's* age does not vitiate its force as precedent. In *Johnson v. Esienstrager,* 339 U.S. 763, 771, 94 L. Ed. 1255, 1262, 70 S. Ct. 936, 940 (1950), the Court reaffirmed the precedent in *Yick Wo* when it observed.

> "[I]n extending constitutional protection beyond the citizenry, *the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction* that gave the power to act. [Emphasis added.] In the pioneer case of Yick Wo v. Hopkins, the Court said of the Fourteenth Amendment, 'These provisions are universal in their application, to all persons within the territorial jurisdiction [emphasis omitted], without regard to any differences of race, of color, or of nationality; ***' " *Johnson,* 339 U.S. at 771, 94 L. Ed. at 1262, 70 S. Ct. at 940, quoting *Yick Wo,* 118 U.S. at 369, 30 L. Ed. at 226, 6 S. Ct. at 1070.

Most recently, in *Plyler v. Doe,* 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982), the Court reaffirmed that the equal protection clause and the due process clause of the United States Constitution apply solely to citizens and resident aliens.

Simply stated, plaintiffs, as aliens who do not reside and who have never resided in the United States, cannot invoke the equal protection or due process clause of either the federal or State constitution in an effort to invalidate section 7(i) of the Act.

Plaintiffs contend, however, that they are not asserting their constitutional rights; rather, they maintain that they are asserting the constitutional rights of their deceased daughter. In support of their position, plaintiffs cite *De Ayala v. Florida Farm Bureau Casualty Insurance Co.,* 543 So. 2d 204 (Fla. 1989), as well as *Jurado v.*

Popejoy Construction Co., 253 Kan. 116, 853 P.2d 669 (1993), which adopted the *De Ayala* analysis. In *De Ayala*, the Florida Supreme Court reviewed a Florida worker's compensation statute which limited benefits to a deceased employee's dependents who did not reside in the United States or Canada to $1,000. The Florida Supreme Court rejected the defendant's contention that the nonresident aliens challenging the statute's constitutionality lacked standing to assert the claims. Emphasizing the Florida Constitution's clause that all persons "be awarded for industry," the court reasoned that the case hinged on the constitutional rights of the deceased worker:

> "The issue in this case is not what petitioners [the nonresident aliens] have earned, but what decedent earned during his life here in the State of Florida. This case concerns whether a worker who happens to have dependents residing out of the country is entitled to the same fruits of his or her labor as any other worker, including the same insurance benefits to be provided," *De Ayala*, 543 So. 2d at 206.

After concluding that the petitioners had the requisite standing, the *De Ayala* court went on to strike down the statute at issue as unconstitutional.

We decline to adopt the reasoning of *De Ayala* and *Jurado*. Instead, we are persuaded by those courts which have concluded that the nonresident aliens challenging the constitutionality of similar statutes lack the requisite standing to do so. See *Barge-Wagener Construction Co. v. Morales*, 263 Ga. 190, 429 S.E.2d 671 (1993); *Martinez v. Industrial Comm'n*, 720 P.2d 416 (Utah 1986); *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M. 59, 607 P.2d 597 (1980). We join these courts in rejecting the notion that

a nonresident alien beneficiary may step into the constitutional shoes of the deceased employee.

Our conclusion unlike the one reached in *De Ayala* and *Jurado*, is grounded not in policy but in precedent. This court has explicitly held that a deceased employee's beneficiary under the workers' compensation statute has no rights derivative of the deceased employee, *A.O. Smith Corp. v. Industrial Comm'n*, 109 Ill. 2d 52 (1985). In *A.O. Smith*, this court examined whether a dependent's cause of action arises on the date of the employee's accident or upon the date of the employee's resulting death. Citing *American Steel Foundries v. Industrial Comm'n*, 361 Ill. 582, 589 (1935), the court observed that a claim for compensation is a statutory benefit exclusively for the dependents and over which the employee has no control and is powerless to release, waive or extinguish. Reasoning that the Act confers upon an employee's dependents a new and independent right to compensation, this court concluded that the dependent's personal cause of action arose on the death of the employee. *A.O. Smith*, 109 Ill. 2d at 56.

Adherence to these prior decisions concerning the nature of death benefits precludes us from allowing plaintiffs standing to challenge the statute's constitutionality in place of their deceased daughter. The death benefits plaintiffs are provided in the workers' compensation system are personal to them and for their exclusive benefit. It is solely through the legislature's enactment of the Act that plaintiffs are eligible to receive *any* benefit upon the death of their daughter, and the legislature was within its authority in drawing the distinctions of which plaintiffs now complain.

II

As a final argument, plaintiffs suggest that section 7(i) of the Act is a statement of foreign policy and therefore infringes on the federal government's power to regulate foreign affairs. Plaintiffs cite no authority for this proposition. We find it patently meritless. The Act is neither a foreign policy document nor a treaty; rather, it is social welfare legislation which exists to provide employees and their dependents certain compensation for injuries or death suffered in the course of employment. Contrary to plaintiffs' bald assertion, neither the Act nor the particular provision at issue run afoul of principles of federalism.

CONCLUSION

We acknowledge that this decision may not hold the equitable appeal of those of Florida and Kansas, both of which have struck down as unconstitutional similar distinctions in their compensation schemes. Our conclusion is inevitable, however, given that nonresident aliens cannot invoke the constitutional protections enjoyed by citizens and residents of the United States. It is within the General Assembly's perview, and not ours, to determine whether fairness dictates a revision in a scheme that differentiates between aliens who reside in the United States, Canada or Mexico and aliens who do not. Accordingly, the trial court's holding that section 7(i) of the Workers' Compensation Act is unconstitutional is reversed. The decision of the Industrial Commission is confirmed.

Circuit court judgment reversed;
Commission decision confirmed.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 3, 1996

Mr. Ivan Rittenberg
Rittenberg & Buffen, Ltd.
309 West Washington Street, #900
Chicago, Il. 60606

No. 79666 – Cesar Jarabe, Sr., Indiv., Etc., appellee, v. Industrial Commission of Illinois (American Airlines, Inc., appellant). Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitle cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 13, 1996.

APPENDIX B

[Dated June 5, 1995]

In The Circuit Court of Cook County, Illinois

CESAR D. JARABE, SR., et al,

Plaintiff-Appellants,

v.

INDUSTRIAL COMMISSION OF ILLINOIS
AND AMERICAN AIRLINES, INC.,

Defendant-Appellees.

No. 93 WC 20068—95 IIC 0209

ORDER

THIS CAUSE coming on to be heard on Plaintiff's Motion For Summary Judgment on his Counts 1) For Declaratory Judgment and 2) Administrative Review pursuant to Section (f) (i) of 820 ILCS 305/19, and the parties appearing by counsel and the court hearing argument and considering briefs, NOW THEREFORE IT IS DECREED, ADJUDGED AND DECLARED:

A) Section 820 ILCS 305/7(i) is declared and held as unconstitutional in violation of the due process and equal protection clauses of the United States Constitution and the Illinois Constitution

B) The Illinois Industrial Commission is not to enforce Section 7(i)

C) The award of the Commission is modified (and American Airlines is to pay) to award plaintiffs the sum of $297.50 per week pursuant to 820 ILCS 305/7(b) from the time of the death of the worker in accordance with the Decision of the Commission under review, in accordance with this courts authority in 820 ILCS 305/19 (f)(2)

D) There is no just reason to delay enforcement or appeal of this final judgment

E) Defendant upon posting an appeal bond, set by this Court at $20,000.00 may continue to pay the Commission Award as limited under Section 7(i), which section this Court had declared unconstitutional and void during the pendency of an appeal, if any.

_____, 19____

ENTER:

/s/ Edwin M. Berman
Judge

APPENDIX C

[Dated February 16, 1995]

State of Illinois

County of Cook—SS:

BEFORE THE
INDUSTRIAL COMMISSION OF ILLINOIS

Cesar D. Jarabe, Sr., individually
and for the benefit of the estate of
Tomasa Isma Jarabe, his deceased wife,

Petitioner,

vs.

American Airlines,

Respondent.

No. 93 WC 20068—95 IIC 0209

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein, and notice given to all parties, the Commission, upon consideration of the entire record and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator which is attached hereto and a part hereof.

The Commission further notices that all parties agree that the Commission is not the forum to adjudicate constitutional challenges. The parties agreed to waive briefs and oral argument.

The Commission allows Petitioner's Motion For the Commission To Issue A Summary Affirmance.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 26, 1994 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Motion For The Commission To Issue A Summary Affirmance is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to the Petitioner interest under S19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by the Respondent is hereby fixed at the sum of $75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Industrial Commission of Illinois in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

FEB 16, 1995

Richard Gilgis
Jacqueline A. Kinnaman
Diane Dickett Smart

C-3

FIRST HEARING OF RECORD: April 14, 1994

State of Illinois

County of Cook—SS.

BEFORE THE
INDUSTRIAL COMMISSION OF ILLINOIS

Cesar D. Jarabe, Sr., Tomasa Isma Jarabe, Teresa Jarabe and Rosita Angub, surviving dependents of Abundia Jarabe Mc Leod, Deceased,

Petitioner,

vs.

American Airlines, Inc.,

Respondent.

No. 93 WC 20068—95 IIC 0209

DECISION OF ARBITRATOR

An application for Adjustment of Claim was filed in this matter and notice of hearing mailed to each party. The matter was heard by an Arbitrator designated by the Commission in the City of Chicago, said County and State, on April 14, 1994.

After hearing the proofs and allegations of the parties and having made careful inquiry in this matter the Arbitrator concludes:

On April 4, 1993, the Respondent American Airlines, Inc., hereinafter called "American", was operating under and subject to the provisions of the Illinois Workers'

Compensation Act; and on this date the relationship of employee and employer existed between the deceased worker, Abundia Jarabe Mc Leod, and said Respondent; on the above mentioned date the Petitioner sustained accidental injuries which arose out of and in the course of the employment by the Respondent; on the above mentioned date the Petitioner sustained accidental injuries which arose out and in the course of the employment with the respondent and which resulted in the death of the worker; and timely notice of this accident was given the Respondent.

The earnings of the deceased worker during the year next preceding the injury were $23,205.52 and that the average weekly wage was $446.26.

Petitioner at time of injury and death was 27 years of age, divorced, and not remarried, and had no children born or adopted.

Necessary first aid, medical, surgical and hospital services have been provided by the Respondent herein.

No compensation has been paid on account of this injury.

The issues in dispute are:

1). Whether funeral expenses should be awarded.

2). Whether any of the Petitioners qualify as dependents under Section 7 [b] or [c] of the Act, 820 ILCS 305/7 [b] or [c].

3). Whether the limitation in the amount of compensation payable for alien claimants residing in nations other than Mexico, Canada and the United State of America set forth in Section 7 [i] of the Act, 820 ILCS 305/7 [i] violates the Constitution of the United States of America or the Constitution of the State of Illinois.

In support of the Arbitrator's decision relating to [1] Whether funeral expenses should be awarded, the Arbitrator finds the following facts that Cesar D. Jarabe paid the funeral bill [Px 8] but is not entitled to the $4,200.00 in burial expenses as Respondent paid $4,200.00 to pay for the cemetery plot and toward funeral expenses.

In support of the Arbitrator's decision relating to [2] Whether any of the Petitioners qualify as dependents under Section 7 [b], [c] or [d] of the Act, *820 ILCS 305/7 [b], [c] or [d],* the Arbitrator finds: that no Section 7 [a] claimants exist; that Cesar D. Jarabe, Sr., and his wife Tomasa Isma Jarabe, are and were totally dependent upon the deceased worker for their support at the time of Abundia Jarabe McLeod's death. They are Section 7[b] claimants and they each qualify for compensation for the remainder of their lives under Section 7 [b] of the Act. This finding is based upon the unimpeached and credible testimony of claimant, Cesar D. Jarabe, Sr., see *City of Olgesby v. Indust. Co.,* 342 Ill. 634. He testified that the deceased worker, his daughter, Abundia Jarabe Mc Leod, provided him and his wife, Tomasa Isma Jarabe, 100% of their income.

Furthermore, he stated that neither he nor his wife had any other source of income. He also testified that the decedent provided them the money to build their home. This testimony is corroborated by bank records and Francisco B. Bangi, Branch Manager of the Maasin, South Leyte, Philippines office of the Philippines National Bank. The records and his testimony show that the decedent regularly sent funds in the United States currency from Chicago, Illinois to her mother and father. These funds were deposited in their account and utilized by them for their support and to purchase their home. No other source of revenue was shown in this bank record.

The Arbitrator also finds based on the evidence in the record that the claimant, Tomasa Isma Jarabe, died January 14, 1994, during the pendency of this claim. Furthermore, the Arbitrator finds that from January 15, 1994, and thereafter Cesar D. Jarabe, Sr. is the only person qualified to receive compensation under Section 7[b] of the Act.

The Arbitrator finds that neither Teresa Jarabe nor Rosita Angub are entitled to benefits under the Act for the following reasons:

1. Neither witness proved that they were dependent on the earnings of the decedent "to the extent of 50% or more of total dependency." as provided by Section 7(d) of the Workers' Compensation Act.

2. Benefits payable under Section 7(d) are collateral in nature and are only to be paid in the event that no compensation is payable under Section 7(b).

3. Under Section 7(i) of the Workers' Compensation Act, benefits are payable to dependent aliens only under Sections 7(a), 7(b) and 7(c). There is no provision for paying benefits to collateral heirs who are not residents of the United States, Canada or Mexico under Illinois Workers' Compensation law.

Accordingly, the Arbitrator orders that the claimants Cesar D. Jarabe Sr. and Tomasa Isma Jarabe, are entitled to receive from the Respondent, American Airlines, Inc., pursuant to paragraph [b] of Section 7, the sum of $148.75 each week for life, being 50% of the compensation, $297.51 per week, otherwise payable pursuant to 8 [b] of the Act, in obedience with the limitation established by Section 7 (i) of the Act, *820 ILCS 305/7 [i]* less $29.75, a 20% attorneys' fee.

Said payments shall be made to Cesar D. Jarabe, Sr. for the benefit of both the claimants through the office of **Rittenberg & Buffen, Ltd.** their attorneys and made payable to the personal representative of the decedent's estate Luisito Querol.

It is further ordered that 50%of such net money awarded, from April 4, 1993, to January 14, 1994, when received in the Philippines, is to be received for the benefit of the Estate of Tomasa Isma Jarabe and shall be distributed by Cesar D. Jarabe, Sr. in accordance with the laws of the Philippines, for the benefit of Tomasa Isma Jarabe's heirs and estate, if any. On and after January 15, 1994, the claimant, Cesar D. Jarabe, Sr., shall be entitled to the entire Section 7[b] award each week for the remainder of this life, minus 20% for attorneys fees to the extent of 364 weeks of compensation paid from April 5, 1993, ending April 5, 2000.

The Respondent is directed to prepare three checks in the following amounts:

1. $4,844.97 representing compensation payable under this award for 40-5/7 weeks from April 5, 1992, through January 14, 1994. ($148.75 X 40.714 less 20% attorneys fees = $4,844.97.

2. $1,529.88 representing compensation payable under this award for a period of 12-6/7 weeks from January 15, 1994, through April 14, 1994, ($148.75 X 12.587 less 20% attorneys fees = $1,529.98).

3. $1,593.74 representing 20% of the compensation payable under this award which is due ($148.75 X 53.571 X .20 = $1,593.74).

Thereafter the law firm of Rittenberg & Buffen, Ltd. shall receive by separate check 20% of all compensation

payments to the extent of 364 weeks, April 5, 1983, ending April 5, 2000, pursuant to *Boyce Murphy v. Indust. comm.* [1994] No. 1-93-504WC, *Field v. Rollins,* [1987] 156 Ill.Alp.3d 786,789, and RITTENBERG & BUFFEN, LTD. may deduct and reimburse its costs in prosecuting this claim including all the associated costs, i.e. travel, food and housing in taking evidence depositions in the Philippines pursuant to the Attorney client contract and *Section 16 a* of the Act from the compensation payable to the personal representative. The personal representative shall approve said costs and an itemized statement shall be sent to Cesar D. Jarabe with his first payment of compensation. Said approval and itemized statement shall be filed with the Commission.

The Arbitrator/Commission reserves jurisdiction as follows: [1] to rule upon any dispute as to costs, if any may arise after the accounting, and [2] to rule upon any *Petition* for additional attorneys, fees, if any, under 16a of the Act, 820 *ILCS 305/16a.*

Notice of any Petition for additional attorneys fees shall be served upon the personal representative and Cesar D. Jarabe, Sr.; acknowledged FAX from the Philippines shall be considered notice.

In support of the Arbitrator's decision relating to [3] Whether the limitation in the amount of compensation payable for alien claimants residing in nations other than Mexico, Canada and the United States of American set forth in Section 7 [i] of the Act, *820 ILCS 305/7 [i],* violates the Constitution of the United States of America or the Constitution of the State of Illinois the Arbitrator finds the following that notwithstanding the her apparent authority in the Section 19, *820 ILCS 305/19,* to determine disputed questions of law and fact related to

the claim and notwithstanding that the Arbitrator finds that the claimants have standing to challenge the constitutionality of Section 7[i], in that the validity of the statute directly affects their rights to compensation, *Goldblatt Bros. v. Indust. Comm.* [1981] and that the Commission in administering the Act must be fair and treat parties in like circumstances equally and comply with applicable substantive law and positive provisions of the **Illinois Workers' Compensation Act,** the **Constitution of Illinois** and the **United States Constitution and Amendments,** *Liquid Carbonic Co. v. Indust. Comm.*, [1933] 352 Ill. 405 and that the equal protection clause of the **Illinois State Constitution, Article 1, Section 2** requires all persons subject to the **Workers' Compensation Act** be treated alike under like circumstances and conditions, *Casparis Stone Co. v. Indust. Brd. of Ill.*, [1917] 278 Ill. 77, and that the requirement that all persons be treated similarly under like circumstances is a federal right applicable to actions of the Commission, *State Brd. of Tax Comm. v. Jackson* [1931] 283 US 527, *Schibel v. Keubel,* [1971] 404 US 357, reh den 405 US 948; the Arbitrator declines to rule on said issue because her authority exists solely by virtue of the Act and the Industrial Commission of Illinois is obliged to administer the Act consistent with and in the manner intended by the General Assembly, *Castillo v. Jackson,* [1992] 149 Ill.2d 165. Furthermore, legal conclusions by the Commission are not binding, *Ill. Bell Tele. v. Indust. Comm.*, [1982] 91 Ill.2d 198 and historically and properly the interpretation of the Constitution of this State is in the exclusive province of Illinois courts pursuant to Article VI of the **Illinois Constitution.** The interpretation of the **Constitution of the United States of America** is within the exclusive province of constitutionally

created courts i.e. those created under Article III of the United States Constitution or in Illinois under Article VI of the Illinois Constitution with the Supreme Court of the United States of America having final judicial authority as to that Constitution and Federal laws. (Accordingly, the issues raised by Claimants herein as to the constitutionality of Section 7 [i] of the Act, *820 ILCS 305/7 [i]* is reserved for the Circuit Court of Cook County, Illinois for its determination pursuant to Section 19(f) of the Act, *820 ILCS 305/19 [f]* through judicial review of this award.)

The Petitioner, Cesar D. Jarabe, Sr., is now entitled to receive from the Respondent, AMERICAN AIRLINES, INC., compensation that has accrued since April 4, 1993 through April 14, 1994, minus 20% attorneys fees and costs to Rittenberg & Buffen, Ltd. and the remainder, if any, of the award to be paid to the Petitioner, Cesar D. Jarabe, Sr., by the Respondent. in weekly payments.

You are further notified that unless a Petition for Review is filed with the Industrial Commission within thirty (30) days after receipt of this decision, and a Review perfected in accordance with the Workers' Compensation Act and the Rules of the Industrial Commission, then the Decision of the Arbitrator shall be entered as the decision of the Industrial Commission. Subject to S19(n) of the Illinois Workers' Compensation Act, the interest rate for purposes of an appeal in this case is 4.98%. However should an Employee's appeal of this case result in either no change or a decrease in this award, interest shall not further accrue from the date of such appeal.

Dated and entered:
August 6, 1994.

Kathleen A. Hagan,
Arbitrator

APPENDIX D

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 10, Clause 1

No state shall enter into any treaty, alliance or confederation; grant letter of marque, and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

Article II, Section 2, Clause 2

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the course of law, or in the heads of departments.

Article VI, Clause 2

This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Section 1, 14th Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

Illinois Workers' Compensation Act 820 ILCS 305/7. Section 7. The amount of compensation which shall be paid for an accidental injury to the employee resulting in death is:

(a) If the employee leaves surviving a widow, widower, child or children, the applicable weekly compensation rate computed in accordance with subparagraph 2 of paragraph (b) of Section 8 [820 ILCS 305/8], shall be payable during the life of the widow or widower and if any surviving child or children shall not be physically or mentally incapacitated then until the death of the widow or widower or until the youngest child shall reach the age of 18, whichever shall come later; provided that if such child or children shall be enrolled as a full time student in any accredited educational institution, the payments shall continue until such child has attained the age of 25. In the event any surviving child or children shall be physically or mentally incapacitated, the payments shall continue for the duration of such incapacity.

The term "child" means a child whom the deceased employee left surviving, including a posthumous child, a

child legally adopted, a child whom the deceased employee stood in loco parentis. The term "children" means the plural of "child."

The term "physically or mentally incapacitated child or children" means a child or children incapable of engaging in regular and substantial gainful employment.

In the event of the remarriage of a widow or widower, where the decedent did not leave surviving any child or children who, at the time of such remarriage, are entitled to compensation benefits under this Act, the surviving spouse shall be paid a lump sum equal to 2 years compensation benefits and all further rights of such widow or widower shall be extinguished.

If the employee leaves surviving any child or children under 18 years of age who at the time of death shall be entitled to compensation under this paragraph (a) of this Section, the weekly compensation payments herein provided for such child or children shall in any event continue for period of not less than 6 years.

Any beneficiary entitled to compensation under this paragraph (a) of this Section shall receive from the special fund provided in paragraph (f) of this Section, in addition to the compensation herein provided, supplemental benefits in accordance with paragraph (g) of Section [820 ILCS 305/8].

(b) If no compensation is payable under paragraph (a) of this Section and the employee leaves surviving a parent or parents who at the time of the accident were totally dependent upon the earnings of the employee then weekly payments equal to the compensation rate payable in the case where the employee leaves surviving a widow or widower, shall be paid to such parent or parents for the duration of their lives, and in the event of the death of either, for the life of the survivor.

(i) Whenever the dependents of a deceased employee are aliens not residing in the United States, Mexico or

Canada, the amount of compensation payable is limited to the beneficiaries described in paragraphs (a), (b) and (c) of this Section and is 50% of the compensation provided in paragraphs (a), (b) and (c) of this Section, except as otherwise provided by treaty.

In a case where any of the persons who would be entitled to compensation is living at any place outside of the United States, then payment shall be made to the personal representative of the deceased employee. The distribution by such personal representative to the persons entitled shall be made to such persons and in such manner as the Commission orders.

(2)

Supreme Court, U.S.
FILED
SEP 16 1996
CLERK

No. 96-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CESAR D. JARABE, SR., individually and for the benefit of the Estate of TOMASA ISMA JARABE, his deceased wife,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and AMERICAN AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

THOMAS J. FLYNN
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14 pp

QUESTION PRESENTED FOR REVIEW

Whether Section 7(i) of the Illinois Workers' Compensation Act which limits the death benefits received by alien beneficiaries who live outside the United States, Mexico and Canada to 50% of what they would otherwise receive under Section 7(b) of the Act is constitutional.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent, American Airlines, Inc., in response to the Petitioner's Writ of Certiorari prays the Petitioner's Writ be denied.

STATEMENT OF THE CASE

The Statement of the Case contained in the Petitioner's Writ of Certiorari is largely correct. However, the Respondent offers the following additions and/or corrections.

The Petition states that the deceased worker, Abundia Jarabe McLeod was a United States citizen. In fact, the record contains no evidence or testimony regarding the decedent's citizenship. Also, the Petition states the deceased was covered by the Illinois Workers' Compensation Act because her work had been declared extrahazardous by the Illinois state legislature. However, at trial there was no issue as to whether the deceased was covered by the Act. Essentially, the parties agreed that the deceased was covered by the Act at the time of her death. Therefore, there was never a declaration that the deceased's work was extrahazardous.

The Petition also states that Judge Berman, of the Circuit Court of Cook County, Illinois, relied upon cases from Florida, *DeAyala v. Florida Farm Bureau Casualty Insurance*, (Fla. 1989) 543 S.2d 204, and Kansas, *Jurado v. Popejoy Construction Company*, (Kan. 1993) 853 P.2d 669, in rendering his decision that Section 7(i) of the Act was unconstitutional. However, Judge Berman made only an oral ruling in this matter with directions to the

parties to draw up the order. There is no published opinion stating the reasons for his ruling. The order indicates only that Judge Berman ruled Section 7(i) unconstitutional as to both the Illinois Constitution and the United States Constitution.

In addition to the workers' compensation claim, the estate of the deceased worker filed a civil action for wrongful death in the Circuit Court of Cook County, Illinois, against numerous defendants. That claim was filed under case number 93 L 15116. The deceased worker's employer, American Airlines, was not a named defendant. However American Airlines subsequently filed a Petition to intervene to protect its workers' compensation lien. On August 16, 1996 the wrongful death claim was settled by an agreement of the parties. The Honorable Robert Boharic entered an order approving the settlement and fixing the Workers' Compensation lien. A copy of that order is attached hereto in the appendix.

REASONS FOR DENYING THE WRIT

1.) The claim now before the United States Supreme Court is moot.

The claim now before the United States Supreme Court arises out of the work related death of Abundia Jarabe McLeod. Ms. McLeod was killed while working for American Airlines at O'Hare International Airport in Chicago, Illinois. Under the Illinois Workers' Compensation Act, the death beneficiaries of Abundia Jarabe McLeod, as defined by Section 7 of the Act, have a claim against American Airlines as her employer. It is out of that claim that the Petitioner's constitutional challenge to the Illinois Workers' Compensation Act arose.

The Estate of Abundia Jarabe McLeod also filed a wrongful death claim against numerous defendants. The Respondent, American Airlines, filed a Petition to intervene in that wrongful death claim to protect its Workers' Compensation lien against any recovery.

The parties in the civil action subsequently entered into an agreement to settle the wrongful death claim. Pursuant to that settlement, an order was entered by the Honorable Robert V. Boharic of the Circuit Court of Cook County, Illinois on the estate's petition to approve the distribution of litigation proceeds and to adjudicate the Workers' Compensation lien. That order states that American Airlines has claimed a Workers' Compensation lien of $25,967.50 which is not disputed. The order also states that American Airlines was granted a credit against future Workers' Compensation payments under the Workers' Compensation award of $324,032.50.

The foregoing credit, agreed to by the parties, renders the Petitioner's constitutional challenge to the Illinois Workers' Compensation Act moot. Section 8(b)(4.2) of the Act states, "[A]ny provision herein to the contrary notwithstanding, the total compensation payable under Section 7 [820 ILCS 305/7] shall not exceed the greater of $250,000.00 or 20 years." *820 ILCS 8(b)(4.2)*. Under the Arbitrator's decision at the Illinois Industrial Commission, Cesar Jarabe, Sr., the deceased's beneficiary, is entitled to weekly benefits of $148.75. Weekly payments of 20 years at that rate would be $154,700.00. Therefore, the maximum benefit the death beneficiary could receive is $250,000.00, significantly less than the credit the Respondent has received. Without the limit of 50% imposed by the statute, the Petitioner would receive weekly bene-

fits of $297.50. The maximum recovery under that rate would be $309,400.00 which is still significantly less than the Respondent's credit.

There is no real controversy before this United States Supreme Court. The relief sought by the Petitioner would declare the limitation of weekly death benefits to non-resident aliens outside the United States, Mexico and Canada unconstitutional. However, such a ruling would have no real effect on the Petitioner as the credit American Airlines has received is greater than any amount the Petitioner would receive. Even if the Petitioner is entitled to full benefits he could only receive $309,400.00. The Respondent's credit more than offsets that amount.

It is well settled that an issue is moot when no actual rights or interests of the parties remain or where events occur which render it impossible for the reviewing court to grant effectual relief to either party. [See for example, *Kandalepas v. Economu*, 645 N.E.2d 543 (Ill. 1st Dist. 1994); *Edwardsville School Service v. Labor Relations Board*, 600 N.E.2d 910 (Ill. 4th Dist. 1994); *Hamer v. Board of Education*, 488 N.E.2d 1096 (Ill. 2d Dist. 1986)] In the United States Supreme Court, Justice Scalia, writing for a unanimous Court, upheld the denial of a motion to vacate a bankruptcy court judgment because settlement had rendered the case moot. *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 115 S.Ct. 386 (1994). Likewise, in the present matter, settlement has rendered this claim moot. The United States Supreme Court cannot render actual or effectual relief to the Petitioner.

2.) The Decision of the Illinois Supreme Court was correct.

Aside from the issue of mootness, the Petition for Writ of Certiorari should be denied as the decision of the Illinois Supreme Court was correct. The Illinois Supreme Court held the Petitioner Cesar Jarabe, Sr. and the Estate of Tomasa Isma Jarabe, his deceased wife, did not have standing to challenge the constitutionality of the statute. The Court stated that the Petitioner, as an alien living outside the United States, cannot invoke the equal protection or due process clause of either the Federal or State Constitution. In other words, the Petitioner simply does not have any constitutional rights as he is not a United States citizen and does not reside and is not present in the United States.

However, as the Petitioner points out, some states, specifically Kansas and Florida, have held that the non-resident aliens in these types of claims take on the rights of the deceased worker in asserting their constitutional claims. [See, *Jurado v. Popejoy Construction Company*, 253 Kan. 116 853 P.2d 669 (Kan. 1993) and *DeAyala v. Florida Farm Bureau Casualty Insurance Company*, 543 S.2d 204 (Fla. 1989)] In those states, the rights of the death beneficiaries are said to be derivative of the deceased worker. But, as the Illinois Supreme Court correctly holds, Illinois case law has already held that the rights of the death beneficiaries are not derivative of the deceased worker. *A.O. Smith Corporation v. Industrial Commission*, 109 Ill.2d 52 (1985). The Petitioner cannot assert the deceased worker's rights but must only assert his own rights, if any exist.

Here, the Illinois Supreme Court has applied Illinois case law to an Illinois statute. The Petitioner is asking this Court to intercede in the state claim and impose constitutional protection. In essence, the Petitioner is trying to extend constitutional rights to anyone outside the United States, who is not a citizen, but has a tenuous connection to the United States because a relative lives there. The Illinois Supreme Court was correct in upholding the statute as constitutional.

CONCLUSION

For the foregoing reasons, this United States Supreme Court should deny the Petition for Writ of Certiorari to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—LAW DIVISION

LUISITO QUEROL, Administrator of the Estate of ABUNDIA J. McLEOD, a.k.a ABUNDIA J. JARABE, Deceased, Plaintiff,	]	
vs.	]	NO. 93 L 15116
AMERICAN EAGLE AIRLINES, INC. et. al., Defendants.	]	

ORDER
APPROVING THE COSTS, FEES AND THE NET PROCEEDS TO HEIRS, AND FIXING THE WORKERS' COMPENSATION LIEN OF TRAVELERS INSURANCE COMPANY AND AMERICAN AIRLINES

This matter coming to be heard in open court on, LUIS P. QUEROL, ADMINISTRATOR, by RITTENBERG & BUFFEN, LTD. and STEINBERG, POLLACEK & GOODMAN, Co-Counsels for the Plaintiffs **Petition** to approve distribution of the proceeds of this litigation to pay fees, and costs in this matter and adjudicate a workers' compensation lien and the allocations of net distribution to the appropriate beneficiaries pursuant to the agreement of said beneficiaries, filed with the COURT, and it appearing that proper notice has been given to the parties hereto and that TRAVELERS INSURANCE COMPANY, intervening and appearing by counsel, and the Court being fully advised in the premises **FINDS**:

1. The defendants have offered to settle this case for $350,000.00.

2. The plaintiff, Luisito Querol, administrator has accepted said sum in settlement and executed a release.

3. The beneficiaries, Petitioner and their attorneys have agreed that said sum is fair and reasonable.

4. Pursuant to the *Workers' Compensation Act of Illinois*, 820 ILCS 305/1, *et. seq*. AMERICAN AIRLINES and/or its insurance carrier, THE TRAVELERS INSURANCE COMPANY, have been paying an award under 820 ILCS 305/7 (b) and (i) in the amount of $148.75 per week to Cesar Jarabe, Sr., the decedent's father, since April 5, 1993.

5. AMERICAN AIRLINES and THE TRAVELERS INSURANCE COMPANY are represented by JOBIN & FLYNN, 190 South LaSalle Street, Suite 1600, Chicago, Illinois 60603 (312) 609-2900. As intervenors and they claim a lien in a gross sum of $25,967.50 (calculated to August 9, 1996) which lien is not disputed.

6. The beneficiaries of this cause of action have agreed to the payment of all legal fees and costs on a prorated basis from the distribution of gross proceeds.

6. Plaintiff's attorneys are entitled to a fee of 40% of the settlement in accordance with the attorney client agreement payable to RITTENBERG & BUFFEN, LTD. and STEINBERG, POLLACK & GOODMAN, Co-Counsels for the Plaintiffs, in the sum of $140,000.00. There were 15 depositions taken in this case, an inspection of the aircraft involved by Attorney Brad Steinberg and on scene photos taken. Attorney, Ivan M. Rittenberg took statements from the heirs in the Philippines which were used

to develop expert testimony on the value of the decedent's relationship to the siblings, all to the end of bringing about to aforesaid settlement.

7. Plaintiff's attorneys, STEINBERG, POLLACK & GOODMAN are entitled to reimbursement of litigation costs of $15,569.72.

IT IS HEREBY ORDERED, APPROVED AND ADJUDGED

a. Plaintiff's attorneys, RITTENBERG & BUFFEN, LTD. and STEINBERG, POLLACK & GOODMAN, Co-Counsels for the Plaintiffs are awarded the sum of $140,000.00 as and for attorneys' fees.

b. Plaintiff's attorneys, STEINBERG, POLLACK & GOODMAN are awarded litigation costs of $15,569.72.

c. The heirs/beneficiaries are entitled to the net distribution in the sum of $194,430.28.

d. Pursuant to the agreement of the beneficiaries on file with this Court it is Ordered a distribution in shares as follows: 1/3rd to the father, CESAR D. JARABE, SR. in the sum of $64,810.03;

2/3rds to be divided equally by the nine (9) sibling beneficiaries being the sum of $129,620.25 in equal shares:

1–Remedio J. Inocando, $14,402.25,
2–Raymundo I. Jarabe, $14,402.25,
3–Rumolo I. Jarabe, $14,402.25
4–Rosita J. Angub, $14,402.25,
5–Rebecca I. Jarabe, $14,402.25,
6–Rito J. Jarabe, $14,402.25,
7–Cesar I. Jarabe, Jr., $14,402.25,
8–Rolando I. Jarabe, $14,402.25 and
9–Theresa I. Jarabe, $14,402.25.

e. AMERICAN AIRLINES and TRAVELERS INSURANCE COMPANY are to be paid $18,320.46 from $64,810.03 payable to Cesar D. Jarabe, Sr. and the Balance sum of $46,489.58 is to be paid to Cesar D. Jarabe, Sr.

f. AMERICAN AIRLINES and TRAVELERS INSURANCE COMPANY are granted a credited against future workers' compensation payments under the workers' compensation award in the sum of $324,032.50.

g. This case is dismissed as settled each party to pay their own costs.

h. The payment and distribution of the proceeds and costs approved herein are made subject to Approval of the Probate Court of Cook County, Illinois.

ENTERED: _____

/s/ Robert V. Boharic
JUDGE
August 16, 1996
Circuit Court-181

Atty# 08323
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Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

No. 96-253

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CESAR D. JARABE, SR., individually and for the benefit of the Estate of TOMASA ISMA JARABE, his deceased wife,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF ILLINOIS and AMERICAN AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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4 pp

The constitutional claims before this Court are not now moot. The Petitioner here was not a party to the common law action. He was a beneficiary of that action. American's Response is correct. The Petitioner will not receive any additional funds under the Workers' Compensation Act of Illinois because American Airlines' credit from the common law recovery brought by the Estate of Abundia J. McLeod exceeds American's monetary liability under the Act. However, the cause of action on review before this Court was not limited to a claim for monetary relief. It was a declaratory judgment action seeking injunctive relief beyond monetary relief. The trial court's order declared the statute in question unconstitutional:

> A) Section 820 ILCS 305/7(i) is declared and held as unconstitutional in violation of the due process and equal protection clauses of the United States Constitution . . .

The trial court entered a permanent injunction. This injunction was for the benefit of this Petitioner *and all persons similarly situated*:

> B) The Illinois Industrial Commission is not to enforce Section 7(i).

This injunction had general application. It protected the Petitioner and all persons similarly situated from the continued illegal and unconstitutional enforcement of Section 7(i) by the Illinois Industrial Commission. In this case, *sub judice*, equitable relief was asked for and granted. This general injunctive relief was dissolved by the Illinois Supreme Court's declaration that the statute is constitutional. In this appeal declaratory and general injunctive relief is still the objective. This is still a matter of constitutional declaratory judgment and constitutional injunctive relief. A favorable ruling in the United States

Supreme Court determining the Court below erred in finding Section 7(i) constitutional reinstates the injunction. The payment of money does not satisfy an equitable remedy. The question and controversy regarding the validity of the permanent injunction that was granted and then reversed on appeal is not moot but still ripe for adjudication in the Supreme Court of the United States. The issue affects fundamental constitutional rights. This litigant and all other persons similarly protected by the injunction granted in the trial court have a real interest and controversy with respect to the declaratory judgment and injunctive relief. *Richardson v. Ramirez*, (1974) 418 U.S. 24, 41 L. Ed. 2d 551, 94 S. Ct. 2655.

CONCLUSION

In the pending appeal the Petitioner did seek a declaratory action and general injunction relief for his own benefit and the benefit of others. The case should not fall for mootness. The case should be decided on the merits for Petitioner's benefit as well as the benefit of other litigants. We cite *Daniel Javier, Deceased by Regina Javier, his wife individually and for Darien Javier, a minor v. Robinson Bus Co.*, Illinois Industrial Commission docket 93 WC 67928 as a case that is now pending and adversely impacted upon by the dissolution of the injunction. The litigants there also await the disposition in this Court of the declaratory judgment on appeal in order to seek the aid of the injunction.

For these reasons, and those previously stated, a writ of certiorari should issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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